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REPLY BRIEF FOR PLAINTIFFS IN ERROR

Supreme Court of the United States

October Term, 1926

No. 492

Office Supreme Court, U. S.
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FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON MACHINE COMPANY, AND THE APPLETON MANUFACTURING AND LUMBER COMPANY,

Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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(32,059)

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APPLETON WOOLEN MILLS, et al.,
Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF OF PLAINTIFFS IN ERROR

For brevity the plaintiffs in error and the defendant in error are referred to herein as plaintiffs and defendant.

Defendant challenges the jurisdiction of this court because:

1. There is no federal question presented nor involved. (Deft's Brief, 4)

2. The decision of the lower court upon a purely State question is adequately sustained in the record. (Deft's Brief, 7)

A mere statement of certain undisputed record facts is sufficient to meet this argument on jurisdiction.

The complaint alleged:

> "These plaintiffs are deprived of the legal and proper use of their said water power in violation of Article V of the Federal Constitution which provides that:
>
> 'No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation,'
>
> and in violation of the provisions of the XIV. amendment of the Federal Constitution expressed in the following words:
>
> 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,'
>
> and in violation of the 13th Section of Article I of the State Constitution, which provides that 'the property of no person shall be taken for public use without just compensation therefor'." (T. R. 9).

Defendant's Answer denied that

> (1) "plaintiffs are deprived of the legal and proper use of their said water power in violation of Article V of the Constitution of the United States.
>
> (2) "plaintiffs are deprived of the legal and proper use of their said water power in violation of the provisions of the XIV amendment to the federal constitution." (T. R. 17)

No other defense was pleaded. All other material allegations of the complaint were admitted. Therefore plaintiffs demurred to the answer. Thus the constitutionality of Sec. 31.08 of the Wisconsin Statutes was the only issue raised by the pleadings. It

was the only question argued before the trial court. It was the only question considered by the trial court. There is no room for doubt on this point. It is impossible to even quibble about it. The first sentence of the opinion of the trial judge states the issue before the circuit court in these plain and unequivocal words,

> "The case presents a single issue of constitutionality of subdivision (3) of Section 31.08 of the Satutes,—the so-called recapture clause of the present water power act." (T. R. 32)

He then proceeded to decide this question adversely to the plaintiffs and in so doing used this introductory sentence:

> "The consideration of *this question* can be approached in the light of fundamental rules of law that are so well established that they are not questioned by any party to this action." (T. R. 32)

The constitutional question raised by the pleadings and decided adversely to plaintiffs by the trial court was the only question raised on the appeal to the supreme court of the State of Wisconsin. No other question was briefed, presented, argued or considered. The supreme court of the State of Wisconsin did not leave this court in the dark as to what it decided in this case. It held absolutely and emphatically that the statute challenged on this appeal is constitutional. This case is officially reported as follows:

> "Fox River Paper Company, Appellant, vs. Railroad Commission of Wisconsin, Respondent, 189 Wis. 626." (T. R. 26)

It is not a memorandum decision in any sense of the word.

The court says, in its statement of the case:

> "The plaintiff claims that the provisions of the statutes requiring the applicant to consent to the valuation prescribed by the statutes in the event that the property is taken over by the state or a municipality at any time after the expiration of thirty years after the permit becomes effective, is *unconstitutional* * * * . The lower court held the law *constitutional* and rendered judgment in favor of defendant, from which judgment the plaintiff brings this appeal." (T. R. 28)

Mr. Justice Owen, announcing the decision of the court, said, (627)

> "Mr. Justice Stevens presided at the trial of this case in the circuit court. He therefore did not participate in the consideration and decision of the case in this court. The members of the court participating are equally divided in opinion upon *the question* involved on this appeal. Mr. Chief Justice Vinje, Mr. Justice Rosenberry and Mr. Justice Eschweiler are of the opinion that the judgment appealed from should be reversed. Mr. Justice Doerfler, Mr. Justice Crownhart and the writer are of the opinion that the judgment should be affirmed. Under the established rule it follows that the judgment should be affirmed. Under the established rule it follows that the judgment appealed from is affirmed." (T. R. 28)

Could an adverse decision on a constitutional question be set forth more clearly or emphatically? The statement of the case made by the court indicates that the single question of the constitutionality of Section 31.08 of the Wisconsin Statutes was before it for consideration. The decision of the court indicates that the judges participating were evenly divided on "the question". No doubt can arise as to what that question was. There is no room here for speculation or conjecture as to the basis of the state court's decision. The

decision conclusively eliminates the possibility that a non-federal question was ever thought of by any member of the court. So far as these plaintiffs are concerned and so far as other riparians in the State of Wisconsin are concerned, this decision in favor of the constitutionality of this statute is final and binding for all time unless reversed by this court.

Counsel for defendant cite divers cases in support of the proposition that because there is no state supreme court opinion here, this court may examine the record in this case to ascertain whether there was an independent ground upon which the state court decision would be upheld. The following cases are so cited:

Klinger v. Missouri, 13 Wall. 257, 263;

Johnson v. Risk, 137 U. S. 300, 306, 307;

Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 69;

Allen v. Arguimbau, 198 U. S. 149, 154, 155;

Bachtel v. Wilson, 204 U. S. 36, 40;

Cuyahoga Power Co. v. Northern Realty Co., et al. 244 U. S. 300, 303. (Deft's Brief 7, 8, 9, 10).

These cases are not in point.

Before stating the rule which controls jurisdiction in this case, we will make brief reference to each of these cases.

Klinger v. Missouri, 13 Wall. 257. The issues and the law on jurisdiction in that case are clearly stated in the second paragraph of the syllabus, page 257:

> "By the constitution of Missouri, adopted in 1865, a test oath was prescribed to be taken by public officers, jurors, etc., which this court, in Cummings vs. Missouri, (4 Wallace 277), decided

to be unconstitutional. A juror, on a trial for murder in a State court, refused to take it; but on being examined as to the reason for his refusal, he alleged, not only that he had sympathized with the late rebellion, and, therefore, could not take it truthfully, but that those were his feelings still, and stronger than ever; whereupon the court discharged him. *Held*, that his avowed present disloyalty to the government was a sufficient cause in itself for his discharge, irrespective of his refusal to take the oath; and as it did not appear that he was discharged for the latter cause, the Supreme Court of the United States refused to take jurisdiction of the case."

Johnson v. Risk, 137 U. S. 300. The issues and the law on jurisdiction in that case are clearly stated in the first paragraph of the opinion, page 366:

"The defendants below demurred upon two general grounds one of which involved the construction of the provisions of the bankrupt act of March 2, 1867, and the other, the bar of the statutes of limitation of the State of Tennessee. So far as we are advised, no opinion was given by the Supreme Court of that State, upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the court proceeded. Inasmuch as one of the defences called for the construction and application of a State statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decisions of the highest court of the State, (Gormley v. Clark, 134 U. S. 338, 348) the plaintiff in error, if he wished to claim that this cause was disposed of by the decision of a federal question, should have obtained the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact."

The decisions of the state courts in the remaining cases under discussion were merely memoranda decisions and are reported in the State Reports as follows:

Allen v. Arguimbau, 48 Fla., 319:

> "Writ of error to Circuit Court, Monroe County; Joseph B. Wall, Judge.
>
> Appearances * * * * *.
>
> "This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. The judgment is affirmed.
>
> "Decision Per Curiam."

Bachtel v. Wilson, Sheriff, 74 Ohio State Reports, 524:

> "Error to Circuit Court of Stark county.
>
> Appearances * * * * *.
>
> "Judgment affirmed.
>
> "Shauck, C. J., Price, Crew, Summers, Spear and Davis, J. J., concur."

The Northern Realty Co. v. The Cuyahoga River Power C., 88 Ohio State Reports, 616:

> "No. 1344. The Northern Realty Co. v. The Cuyahoga River Power Co. Decided September 23, 1913. Error to Circuit Court of Summit county. Appearances * * * * *. Judgment affirmed. Johnson, Donahue, Newman and Wilkin, JJ., concur."

Comparison between the decisions in the state courts in each of these cases and the decision of the Wisconsin supreme court in the case at bar is unnecessary.

As above stated, the supreme court of Wisconsin held that the federal question involved was before it for consideration and actually decided it adversely to the federal right asserted. Therefore, it is the duty of this court to take jurisdiction under the familiar rule stated in Rogers v. Hennipen County, 240, U. S. 184, 188-189. In that case this court said:

> "It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment, assuming it to be a final judgment as it is here. Hancock National Bank v. Farnum, 176 U. S. 640, 642; San Jose Land Co. v. San Jose Ranch Co., 189 U. S. 177, 179, 180; Am. Exp. Co. v. Mullins, 212 U. S. 311, 313; Atchison, Topeka and Santa Fe Ry. v. Sowers, 213 U. S. 55, 63; Miedreich v. Lauenstein, 232 U. S. 248, 257; Carlson v. Curtiss, 234 U. S. 103, 106; Mallinckrodt Works v. St. Louis, 238 U. S. 41, 49."

To the same effect in North Carolina Railroad Company v. Zachary, 232 U. S. 248, 257, this court said:

> "In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the State either decided or assumed that the record sufficiently presented a question of Federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass

upon the merits of the Federal question. Home for Incurables v. City of New York, 187 U. S. 155, 157; Land & Water Co., v. San Jose Ranch Co. 189 U. S. 177, 179; Haire v. Rice, 204 U. S. 291, 299; Chambers v. Balt. & Ohio R. R., 207 U. S. 142, 148; Miedreich v. Lauenstein, decided this day, ante, p. 236."

Further citation of authority appears to be unnecessary, nor would it serve any useful purpose, to summarize or analyze the cases cited by the court in these cases.

Estoppel is urged. (Deft's Brief, 12, 13, 14, 15, 16).

In support of this contention, defendant cites Pera v. Shorewood, 176 Wis. 261, wherein plaintiff claimed compensation for damages under an ordinance and "came into court relying upon the ordinance as a valid basis for his claim"; State ex rel. Kellogg vs. Currens, 111 Wis. 431, wherein it was held that applicant for a license to practice medicine having depended upon the validity of the statute on which he based his claim, therefore estopped from challenging its constitutionality; Enterprise Irrigation District et al v. Farmers Mutual Canal Co., 243 U. S. 157, 163, wherein this court said, page 165,

> "It does not, as we think, admit of doubt that the estoppel *in pais* is made an independent ground of the judgment. Instead of being interwoven with the validity of the state board's adjudication, which is the other ground, it is distinct from it and is so treated in the court's opinion * * *. Also that estoppel was presented by the pleadings, was in the mind of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance;"

Hurley v. Commission of Fisheries, 257 U. S. 223, 225, wherein this court stated, page 225:

> "Appellant sought a temporary injunction restraining the Virginian Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds in the Rappahannock River, planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment.
>
> "He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that proposed action would deprive him of property without due process of law contrary to the Fourteenth Amendment.
>
> "A majority of the three judges composing the court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights of property appellant claimed in respect of the specific lands, or the oysters thereon, were necessarily based upon the statute itself and that he could not both assail it and rely upon it in the same proceeding."

Central Land Co. v. Laidley, 159 U. S. 103, wherein the court says, pages 109, 110:

> "The appellate jurisdiction of this court upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state

> court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction of the statute."

Sayward vs. Denny, 158 U. S. 180, wherein this court, in dismissing writ of error, said:

> "It is enough that there is nothing in the record to indicate that the State courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

Other cases are cited in support of defendant's contention on estoppel, but we make no comment upon them because they do not appear to be in point.

Further, estoppel was not pleaded. It was not presented to the trial court. It was not presented to the supreme court. It was not considered by either court. The supreme court of the state of Wisconsin decided that Section 31.08 Wisconsin Statutes does not violate the Federal Constitution. Though the defense of estoppel or some other defense could have been successfully urged by the defendant, that fact does not deprive this court of jurisdiction.

Even if we concede that the Wisconsin supreme court could have brought itself to hold that this statute is elective like the workmen's compensation laws because,

as counsel suggest, plaintiffs are free to install steam power on their lands adjacent to the Fox River, (Deft's Brief, 11) it would still be the duty of this court to take jurisdiction.

This contention is fully supported by Rogers v. Hennepin County and North Carolina R. R. Co. v. Zachary, supra, and cases therein cited; also by Grayson et al v. Harris, et al., 267 U. S. 352, decided March 2, 1925, wherein this court said, page 358:

> "Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not. Rogers v. Hennepin County, 240 U. S. 184, 188-189; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 608."

Defendant's contentions with respect to jurisdiction are untenable. The record clearly indicates the fact to be that the defendant in the trial court and in the supreme court of the state of Wisconsin elected to contest the constitutionality of this statute in this proceeding. The state court of last resort proceeded on this theory. It held the statute valid against plaintiff's claim of unconstitutionality under the Federal Constitution. Therefore, the defendant must submit to the jurisdiction of this court. It is to the interest of plaintiffs, defendant, the riparians of Wisconsin and all its people that this case be decided on the merits at this time. Delay of such decision will serve no useful purpose.

REPLY ON THE MERITS

OWNERSHIP OF WATER POWER

Under this head we cite in Note 7 our brief divers cases to show the Wisconsin rule. Such cases are criticised and analyzed by defendant's counsel on pages 35 to 46 of their brief. It is true that none of these cases, except the leading one, the Water Power case, were in the name of the State. But in Conn. vs. Little Suamico, the plaintiff, Conn, relied upon the soveriegn right of the state respecting navigation as against the right of the riparian to build a mill dam. The right of the State was as completely involved and adjudicated as if the State had been plaintiff.

In Green Bay and M. Canal Co. v. Kaukauna Water Power Co. the contention was over the right of the water power company as a riparian to the water power as against the State to take the power in aid of slack water navigation. The determination of the State court was that the water power company was, as against the State, the owner of the water power, but that it had been taken by the State for public use for navigation and full opportunity had been given the water power company to have "just compensation." The holding of this court was to same effect (142 U. S. 272, 273, 276).

The language of Mr. Justice Brown quoted by the defendants in their brief, page 36, includes this: "if the State could condemn this use of the water with the other property of the riparian owner, it may raise a revenue from it sufficient to complete the work which might otherwise fail." Plainly this language relates to the condemnation by the State of the water power

under the right of eminent domain, which is certainly entirely contradictory to the idea that the water power was the property of the State to be used for public purposes. The use therein was for a public purpose.

There has been much water power litigation in Wisconsin, all of which has proceeded on the assumption that the riparian is the owner of the power, wherein there was no express statement of such rule, because no such question was raised. (Note 1)

Defendant says, "Nowhere has it been decided that the public use does not include the use of navigable waters to develop water power for public purposes." (Deft's Brief, 24).

"That the energy of falling water in a navigable stream is not a riparian right; (Deft's Brief, page 27).

"That developed power is appurtenant to the dam and not to the riparian lands." (Deft's Brief, page 27).

Note 1.

The Orton-Noonan Cases on Milwaukee River, reported in 4 Wis., 335 (1856); 27 Wis. 272, (1870); 30 Wis. 611 (1872); 31 Wis. 265 (1872); 31 Wis. 297 (1872); ;

Blanchard vs. Doering, 21 Wis. 477 (Rock) 1867;

Blanchard vs. Doering, 23 Wis. 200 (Rock) 1868;

Samuels vs. Blanchard, 25 Wis. 329 (Rock) 1870;

Clark vs. Plummer, 31 Wis. 442 (Wisconsin) 1872;

Valley P. & P. Co. vs. West, 58 Wis. 599 (Fox) 1883;

Mack vs. Bensley, 63 Wis. 80 (Wisconsin) 1885;

Pioneer W. P. Co. vs. Bensley, 70 Wis. 476 (Wisconsin) 1888;

Mack vs. Bensley, 74 Wis. 112 (Wisconsin) 1889.

On the other hand, no suggestion has heretofore ever been made so far as we know that the public use does include the use of navigable waters to develop power for public purposes, but all Wisconsin cases involving water power rights heretofore reported, proceed upon the supposition that such power is the private property of the riparian, appurtenant to the bank.

If this view of the nature of a title to water power is right, we in Wisconsin have all been wrong from the beginning. If this is right, then the foundation on which we have heretofore rested title to property is broken up. It then becomes a question of time and circumstance when the title to any property may fail. Whether it is right that there should be private ownership of natural resources is a question with which this brief does not meddle. But when timber shall become of public use and hence the State may take it; when farm land shall become of public use and hence the State may take it; then, if water power shall become of public use, the state may take it. But until we reach the time when all natural resources shall be held to be public property inalienable by the State, it would seem that water power should continue to be held to be private property of the riparian to be taken by the public only upon making "just compensation."

No suggestion has ever been made that the bank does not belong to the riparian. Riparian rights include the right to water power appurtenant to the bank and not to the bed of the stream. It is, as its name implies, a riparian or bank right. (Note 2).

OTHER STATE LEGISLATION RESPECTING WATER POWER.

By Sec. 8, Ch. 212, Laws of 1849, it was enacted that,

> "Whenever there shall be a water power upon any school or university lands which are offered for sale, it shall be optional with the commissions to sell together all the tracts or lots upon which such water power is situated, and such other tracts or lots as are necessary for the use and enjoyment of the same, not exceeding, however, one hundred and sixty acres, or they may sell each such tract and lot separately, as in their opinion will be most beneficial to the interests of the school and university fund."

Note 2.

Deitrich vs. Railroad Co., 42 Wis. 248 (1877);
Fox River Paper Co. vs. Kelly, 70 Wis. 287, 294-5, 298 (1887);
Merwin vs. Houghton, 146 Wis. 398, 405;
Lyons vs. Fishmongers, L. R. 10 C. H. 679;
Lyons vs. Fishmongers, L. R. 1 App. Cas. 662 (1876);
Canal App. vs. People, 17 Wend. 571 (1836);
People vs. Tibbits, 19 N. Y. 523 (1859);
Brisbine vs. Railway, 23 Minn. 114 (1876);
Carli vs. Railway, 28 Minn. 373, 380 (1881);
State vs. Milling Co., 26 Minn. 229, 231-2 (1879);
Canal Commrs. vs. Kempshall, 26 Wend. 404, 418-9 (1841);
Kent's Com. 11th Ed. V. 3, 439;
Gould on Waters, Sec. 148;
Farnham on Waters, V. 11 Sec. 463 pp. 1568-9-0;
Lewis Em. Dom. Sec. 61b p. 71, Vol. 1;
Coulson & Forbes, 62-3-4, 110-1-2;
Wiel on Waters, Sec. 906.

This legislation recognizes the fact that water power existing on lands adds to their value in the hands of the riparian. It was re-enacted in the same language as Sec. 8 of Ch. 24 of Revision of 1849, and as Sec. 24 of Ch. 28 of Revision of 1858. It was also re-enacted as Sec. 195 of Revision of 1878, appearing there in the following language:

> "Whenever there shall be a water-power upon any of said lands which are offered for sale it shall be optional with said commissioners to sell together all the tracts or lots upon which such water power is situated and such other tracts or lots as are necessary for the use and enjoyment of the same, not exceeding, however, one hundred and sixty acres, or they may sell each such tract or lot separately, as in their opinion will be most beneficial to the fund to be derived from such sale."

Sec. 1052 of Revision of 1878 provides that the assessor in determining the value of real property,

> "shall consider, as to each piece, its advantage or disadvantage of location, quality soil, quantity of standing timber, water privileges, mines," etc.

This provision was enacted as Sec. 16 of Ch. 130 of the Laws of 1868, and continued as Sec. 1, Ch. 250 of the Laws of 1877, and Sec. 1 of Ch. 334 of the Laws of 1878.

Sec. 135 of Revision of 1878 provides that,

> "the terms 'real property', 'real estate', and 'land' when used in this title shall include not only the land itself but all buildings, fixtures, improvements, rights and privileges appertaining thereto."

Under these two sections valuation of land in view of appurtenant water power (drawn from a navigable river) was sustained in Spensley vs. Valentine, 34 Wis. 154. And in Smith vs. Ford, 48 Wis. 115, at 163,

it was held that a race-way, the only use of which was to carry water for power to mill lots, could not be assessed separately from the lots.

Sec. 1, Ch. 95 of Laws of 1901, provides that,

> "every city of the fourth class * * * is hereby authorized and empowered to purchase, lease or construct steam power or water power for"

general public purposes. It can hardly be contended that this provision relates to the purchase of water power of which the State is the owner as a riparian on account that no school or university lands or other lands of which the state is the riparian owner would be found in or near cities of the fourth class.

Neither can it be claimed that the meaning of this statute was that the water power to be purchased was water power of the State, nor appurtenant to any riparian lands, on account that up to and long after the passage of this act water power was universally recognized as an appurtenant to riparian ownership, as appears by other legislation and judicial decision, and as particularly appears by necessary inference from Sec. 195 of the Revision of 1878.

In 1909, by Ch. 374 (207-m), the legislature enacted that,

> "whenever the State of Wisconsin shall hereafter convey in any manner whatsoever any of its lands, the conveyance thereof shall be subject * * * to continued ownership by the State of all water power rights on such lands or in any manner appurtenant thereto."

In 1907, the legislature proposed and agreed to a constitutional amendment to enable the State to acquire the water powers. Res. 31, 1293).

In 1909, the legislature ratified and agreed to this amendment, and submitted the same to the people. (Ch. 514).

At the November election, 1910, the people duly ratified and adopted this amendment. (Acts 1911, 1152-3).

In 1911, the legislature proposed and agreed to a constitutional amendment to enable the State to acquire the water power resources of the State. (Res. 47, 1121).

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The River St. Mary, therein involved, is an international river necessarily subject to the treaty making power.

In that part of the language of Mr. Justice Lurton quoted in defendant's brief, on page 30, appears the following:

> "Nor need we consider cases cited which deal with the rights of riparian owners under State laws."

WISCONSIN RIPARIAN DOES NOT NEED ANY GRANT OF RIGHT OR POWER.

Defendant cites the case of Wisconsin River Improvement Co. vs. Lyons, 30 Wis. 61, as authority that the state may properly refuse permission to the riparian to build a dam for water power notwithstanding the fact that such dam would not interfere with navigation or any other public right or endanger property, health or life. To the contrary are two cases later in time quoted from in plaintiff's brief at pages 23, 24 and 25, both holding distinctly to the contrary. One of them, Janesville vs. Carpenter is referred to with approval in Kaukauna Co. vs. Green Bay and M. Canal, 142 U. S. 254 at 271-2.

In the Water Power Cases, Mr. Justice Timlin says,

> "We say that if the exercise of this riparian right in the judgment of the legislature interferes with the public right of navigation, it may be forbidden." (149) "The state may refuse its permission to the riparian owner to build a dam and may attach conditions to its consent such as the heighth, strength, mode of construction, etc. of the dam, and perhaps other conditions, but it may not seize upon this right without compensation and use it or sell it or lease it to another." (150).

EFFECT OF FRANCHISE THEORY

Defendant's brief is largely, practically wholly, concerned with the proposition that the state permit to build a dam in a navigable river is a franchise; and that a franchise is a contract entered into for a valuable consideration; and that such contract is a sufficient consideration for the surrender of the defendant's constitutional right to just compensation for property taken.

Let us suppose all this to be so. There remains the indisputable fact that the legislative act questioned operates a taking of private property for public use without compensation.

We have then the contract on the part of the state that the riparian may enjoy the water power maintained by his dam for thirty years, but suppose that within the thirty years the dam has become, on account of increased stream flow, a menace to safety, or that, on account of diminished stream flow, it has become an interference with navigation, what then has become of the police power of the state to control the navigable river in the interest of the public.

In this case, we have then the question, not *what* is the law, but *which* is the law?

In Hudson Water Co. vs. McCarter, 209 U. S. 349, Mr. Justice Holmes says,

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded and which becomes strong enough to hold their own when a certain point is reached." (355). He further says, "It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the principles of common law." (357).

Herein we have neither a common law rule against a common law rule, nor a constitutional principle against a constitutional principle. We have an ordinary incidental common law rule set up against the

rule requiring just compensation for private property taken for public use. This is the broad shield of the citizen, of which Mr. Justice Brewer says that it constitutes, "one of the most certain tests of the character and value of the government," and of which Chancellor Kent says, "that this inviolability of private property, even as it respects the acts and wants of the State, *unless a just indemnity be afforded* * * * has frequently been made the subject of expressed and fundamental articles of right in the constitution of government * * *, and "this principle * * * is founded on natural equity and is laid down by jurists as an acknowledged principle of universal law," and of which Mr. Justice Dayton says that it "reaches back of all constitutional privileges; and it seems to have been considered a settled principle of universal law," and Mr. Justice Rodman says "The principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina."

Respectfully submitted,

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